



April 15, 2002

Mr. Therold I. Farmer  
Walsh, Anderson, Brown, Schulze & Aldridge  
P.O. Box 2156  
Austin, Texas 78768

OR2002-1877

Dear Mr. Farmer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 161281.

The Navasota Independent School District (the "district"), which you represent, received a request for any documents concerning "any communication to or from Education Custodial Systems (ECS) and the School District," "potential bidding specifications for janitorial services," and "any trips made by the Superintendent of schools when accompanied by a representative from Education Custodial Systems." You state that you have released ten pages of information responsive to the request. However, you claim that the additional responsive information is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. The district also believes that the request for information implicates the proprietary interests of ECS, a third party that submitted the information to the district in the anticipation of a request for proposals. We note that you have submitted correspondence indicating that you have notified ECS of the request for information pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). The district also submitted the information at issue to this office. We received correspondence from ECS. We have considered these arguments, as well as those of the district, and have reviewed the submitted information. We have also considered the comments submitted to this office by the requestor. *See* Government Code § 552.304.

Initially, we note that you have not submitted any information responsive to category three of the request for information to this office for review. To the extent that such information exists, it must be released to the requestor. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000).

Section 552.104 of the Government Code states that information is excepted from required public disclosure if release of the information would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body usually in competitive bidding situations. See Open Records Decision No. 592 (1991). This exception protects information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. See Open Records Decision No. 463 (1987). In this case, you state that “the information appears to have been provided, unsolicited, to the District in an effort to interest the District in and to tout the advantages of “out-sourcing” or “privatizing” certain aspects of its custodial operations.” You inform this office that the district has not sought bids or proposals or invited offers for custodial services at this time. Therefore, there is no competitive bidding situation and section 552.104(a) is inapplicable to the unsolicited proposal.

Section 552.110 of the Government Code protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. ECS does not argue that any of the information held by the district constitutes a trade secret. The commercial or financial branch of section 552.110 requires the interested third party raising this exception to provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov’t Code § 552.110(b); Open Records Decision No. 661 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); see also *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

ECS asserts that Groups 1, 2, and 3 of the submitted business plan constitute commercial financial information. ECS states that the proposal constitutes “recommendations regarding staffing and costing information resulting from a preliminary analysis conducted without the support of [the district]” and that “the competitive advantage that ECS has with any proposal is our ability to determine what our customers require, do the homework and suggest creative options for customer consideration.” ECS also explains that it has “invested considerable resources into an analysis of [the district’s] physical plant, developed recommended staffing requirements with an experienced based proprietary database, researched the local labor market to complete a comprehensive costing proposal” and that “bidders would be provided a competitive advantage with data collected by ECS.” Based on ECS’s arguments and our review of the submitted information, we believe that the release of portions of the information contained in Group 1 would cause ECS substantial competitive harm. Therefore, the information that we have marked in Group 1 of the proposal may be withheld from disclosure under section 552.110(b) of the Government Code. However, we find that ECS has not demonstrated that release of the information in the remainder of Group 1 and

Groups 2 and 3 of the proposal would cause substantial competitive harm. Therefore, this information may not be withheld from disclosure.

ECS also maintains that its proposal must be withheld because the proposal is marked as "confidential and proprietary information." However, information that is subject to disclosure under the Public Information Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Further, it is well-settled that a governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. *See Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987, 444 at 6 (1986).* Consequently, the submitted information must fall within an exception to disclosure in order to be withheld from disclosure.

The district argues that the requested proposal must be withheld under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The district has not directed our attention to any law, nor are we aware of any law, under which any of the submitted information is deemed to be confidential. *See, e.g., Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy).* Therefore, none of the submitted information may be withheld from disclosure under section 552.101 of the Government Code.

We note that the submitted information contains e-mail addresses obtained from the public that are excepted from public disclosure. Section 552.137 of the Government Code makes certain e-mail addresses confidential and provides in relevant part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Accordingly, as there is no indication that there has been consent to any release, the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code.

We further note that two pages of Group 2 of the proposal are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, we conclude that the portions of Group 1 of ECS's proposal that we have marked may be withheld from disclosure pursuant to section 552.110(b) of the Government Code. Also, the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. All other information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. Montgomery Meitler  
Assistant Attorney General  
Open Records Division

WMM/sdk

Ref: ID# 161281

Enc: Submitted documents

c: Mr. Christopher W. Peterson  
Meece & Associates  
1716 Briarcrest, Suite 605  
Bryan, Texas 77868  
(w/o enclosures)

Mr. Roy G. Thornton  
ECS  
P.O. Box 1094  
Montgomery, Texas 77356  
(w/o enclosures)